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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 301.

GUARANTY TRUST COMPANY OF NEW YORK,
Executor, Estate of Lamar L. Fleming, deceased,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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THE BALLOU PRESS NEW YORK

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BRIEF FOR THE PETITIONER.

Opinions below, jurisdiction and Statutes and Regulations involved.

The opinions of the Board of Tax Appeals and the Circuit Court of Appeals (R. 37 and R. 57) are reported in 34 B. T. A. 384 and 89 F. (2d) 692, respectively.

The judgment of the Circuit Court of Appeals was entered on May 10, 1937 (R. 60). A petition for a writ of certiorari was filed August 10, 1937, and was granted October 11, 1937. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

The Statutes and Regulations involved are set forth in an Appendix, *infra*, pages 26-28.

Statement of the Case.

The case is an income tax case arising under the Revenue Act of 1932. The Commissioner found a deficiency of $39,874.31 (R. 6). An appeal was filed with the Board of Tax Appeals, which held the deficiency unwarranted and, since in the meantime the petitioner had made certain payments on account of the deficiency, found an overpayment of $37,888.89 (R. 48). The Circuit Court of Appeals for the Second Circuit reversed the Board and upheld the Commissioner (R. 57). The case is here on petition for certiorari, granted October 11, 1937 (R. 61).

The Question Presented.

The decedent died December 16, 1933. At the time of his death he was a member of a partnership whose fiscal year ended July 31, 1933. In the decedent's prior-to-death income tax return, the petitioner included the decedent's distributable share of the partnership income for the fiscal 12 months' period ending July 31, 1933. The single question presented is whether, in addition, there should have been included the decedent's share of the partnership income for the 4½ months' period between August 1, 1933, and December 16, 1933.

The Statement of Facts.

The case was tried upon the petition and answer (R. 2, 10) and a stipulation of facts with Exhibits attached (R. 11). In stating the facts, we shall follow closely the findings of facts made by the Board, elaborating only where necessary.

The decedent, Lamar L. Fleming, died December 16, 1933. For a number of years prior to his death he was a member of the partnership of Anderson, Clayton & Fleming, with its

principal place of business in New York City and branches in other cities of the United States and Europe (R. 11, 38).

The business of the partnership was operated on the cash receipts and disbursements basis, and a fiscal year ending July 31 of each year (R. 12, 38). The decedent likewise was on the cash receipts and disbursements basis, but kept his accounts and made his tax returns on a calendar year basis (R. 11, 38).

The partnership was formed in 1918. It was engaged in the buying and selling of cotton, the handling of foreign exchange, and the conducting of financing operations incidental to the cotton business (R. 11). The successive partnership agreements under which it has operated provided for a fiscal year ending July 31 (R. 19, Ex. A). On August 1, 1933, a new partner was admitted to the firm and a new partnership agreement was made, which was identical with the previous one, except as to the division of the profits (R. 12, 38). Thus the partnership articles executed August 1, 1933 (R. 23, Ex. B) provided:

> "Third. The co-partnership hereunder shall commence as of August 1, 1933, and shall continue until July 31, 1934 (hereinafter sometimes called 'the fiscal year'), and shall be deemed to have been continued and extended from year to year thereafter, unless any one of the parties hereto shall give notice in writing, not less than thirty days prior to July 31st of any year, of intention to terminate this contract of partnership upon July 31st of such year * * *."

On account of this fiscal year basis, the articles also provided (R. 25, Ex. B):

> "Sixth. At the end of each fiscal year during the continuance of this co-partnership, for the purpose of ascertaining the net gains and profits for the preceding year, a general account shall be taken and stated by the partners of all the money, claims, assets, * * *."

Then follows the percentages of the several partners, the decedent's share being 32.5%.

In accordance with the contract of partnership, an account was taken at the end of the fiscal year July 31, 1933, and decedent was notified of his share of the profits for the preceding 12 months. A large portion of his share was allowed to remain to his credit with the partnership (R. 12, 38). No part of the earnings of the partnership for the period between the end of the fiscal year July 31, 1933, and his death was paid to or received by the decedent or by his executors during the calendar year 1933 (R. 14, 39). The partnership agreements provided for but one yearly accounting and settlement, which was at the end of the fiscal year (R. 42).

After the decedent's death the business of the partnership was continued under the same name by the surviving partners (R. 12, 39). An audit of the partnership accounts for the period August 1, 1933, to December 16, 1933, was made, but was not completed until January 30, 1934. Liquidation of the partnership was commenced early in 1934 (R. 14). On or about January 9, 1934, decedent's executors received in partial distribution and liquidation of the partnership an amount which consisted of the capital invested by the decedent, the credit balance on deposit due decedent, and decedent's share of the profits of the partnership between the end of its fiscal year July 31, 1933, and decedent's death, December 16, 1933 (R. 14, 39).

In February, 1934, decedent's executors received a final distribution of $15,067.39 and interest of $82.56 (R. 14, 39). The sum of $15,067.39 included an item of $13,894.74 constituting the decedent's share of certain "open" commissions, i.e., commissions upon purchases and sales of cotton for future delivery made prior to the decedent's death but which, due to a recognized trade practice, were not in fact received until 1934 (R. 13, 14, 39).

In May, 1934, the surviving partners entered into a new partnership agreement, taking over the firm's business as of December 18, 1933 (December 17 being a Sunday), and providing for a fiscal year ending July 31, 1934, and from year to year thereafter (R. 12-13, 39).

Decedent's executor duly filed an income tax return for the period January 1 to December 16, 1933, the date of his death, and included therein his distributive share of the profits of the partnership for the fiscal year ending July 31, 1933 (R. 14, 39). The executors did not include (1) the decedent's share of the profits of the partnership for the 4½ months' period between July 31, 1933, the end of the fiscal year, and the date of decedent's death; (2) the decedent's share of the open commissions earned during that period but not collected until the following year; nor (3) the interest on the decedent's capital investment in the firm and on the decedent's credit balance. These items were all determined by the post-death firm audit completed January 30, 1934 (R. 13, 39).

In determining the deficiency, the respondent added to the decedent's share of the firm income reported in the return the sum of $63,494.46, representing the decedent's share of the partnership profits for the 4½ months' period between July 31, 1933, and December 16, 1933, and $5,559.19 interest (R. 15, 39). The item of $63,494.46 was made up of the decedent's share of the cash earnings of the partnership and the earned but uncollected commissions during the 4½ months' period. The item of $5,559.19 consisted of the interest on the decedent's capital investment and credit balance for the 4½ months' period and $50 from some other source (R. 15, 39-40). The effect of adding these items to the income already reported was to include in the decedent's prior-to-death return his share of the firm's profits over a period of 16½ months.

The executors of the estate of the decedent duly filed an estate tax return, which included decedent's credit balance with the partnership, his capital interest therein and his share of the profits earned during the period August 1 to December 16, 1933, and paid the estate tax thereon (R. 16, 40). Upon the audit of the estate tax return so filed, the value of the decedent's interest in the firm as reported was accepted by the Treasury (R. 16-17).

On February 28, 1934, the survivors of the partnership filed a return for it in liquidation captioned "Fiscal year beginning August 1, 1933, and ended December 16, 1933;" and on October 28, 1934, they filed a return captioned "Fiscal year December 17, 1933, to July 31, 1934." Both of these returns were made without permission or direction of the Commissioner (R. 17, 40).

On or about March 5, 1935, the executor of the estate of the decedent waived the restrictions upon the assessment of $37,917.39 out of the total deficiency in tax of $39,874.31 determined by the Commissioner, and paid into the Treasury such amount, reserving the right to prosecute the pending appeal and to recover as an overpayment any amount which might be found to be due under the final decision of the Board herein (R. 17, 40).

In his petition of review filed with the Circuit Court of Appeals, the respondent did not take exception to the Board's ruling excluding from income (1) the decedent's distributive share of the so-called "open" commissions earned prior to but not collected until after the decedent's death (i.e. $13,894.74), or (2) the interest on decedent's firm capital and credit balance between July 31, 1933, and December 16, 1933 (i.e. $5,509.19), thus acquiescing in the Board's ruling in respect of these two items (R. 49).

With the Commissioner's original addition to income from partnership profits of $63,494.46 (Deficiency Notice, R. 6) and the elimination of the two above items acquiesced in, the additional income now in controversy amounts to $49,599.72.

The Errors Alleged.

1. The Circuit Court of Appeals erred in holding that the amount of $49,599.72 representing the decedent's share of the partnership profits from August 1, 1933, to December 16, 1933, was taxable income to the decedent.

2. The Circuit Court of Appeals erred in failing to hold that the decedent's taxable income from the firm in 1933 was limited to his distributive share of the firm profits for the 12-month fiscal period ended July 31, 1933.

3. The Circuit Court of Appeals erred in holding that the death of the decedent terminated a second "taxable year" of the firm, thus throwing some 16½ months' firm income into the 1933 income tax return of the decedent and the eight surviving partners.

ARGUMENT.

Preliminary Statement.

The respondent in the Board and in the court below predicated his argument on the assertion that unless the disputed item of income was included in the prior-to-death income tax return, such income would escape the income tax altogether. This begs the entire question, for it assumes that the provisions of the statute were drawn with a view of taxing all items of income, regardless of Congressional policy. In urging the argument, the respondent wholly overlooks the structure of the taxing acts as they existed when this case arose.

Let us approach the problem uncomplicated by the circumstance that the decedent on death was a member of a partnership with a fiscal year. Take the ordinary case of a decedent on the cash and calendar year basis who died within the year. In such a case, three returns are required, a prior-to-death income tax return, an estate tax return, and a post period executor's income tax return. Prior to the Revenue Act of 1934, the rules covering such returns were perfectly clear. In the prior-to-death income tax return there must be included the income *actually received* within the calendar year and prior to the death; there was not included items of accrued income, i. e. earned but *not* received

(such as unpaid commissions, unpaid professional fees where the work had been performed and the like). But such unpaid items did not escape taxation, for the value of such items must be included in the estate tax return and tax paid thereon. In the post-death income tax return, the executors included income actually received since the date of death, not including the receipts on account of services rendered prior to death, for such receipts were already taxed in the estate tax return.

So far as we are aware, the Treasury has recognized and invariably enforced these rules, so that they have become the recognized policy of Congress. There is an early income tax ruling, II Cum. Bul. 1 p. 151 (1923), in which the Department said:

> "If the decedent was alive at the time the payment was made upon the day of his death the amount paid is his income. On the other hand, if the decedent had died before payment was attempted to be made, it is obvious, where the decedent is on the receipts and disbursements basis, that this amount was not income to him during his life because never received by him."

In *Nichols* v. *United States*, 64 Ct. Cl. 241 (1927—arising under the Revenue Act of 1918), the Government was attempting to tax as income in the executor's post-death return an item of income earned prior to but not received until after the death. As stated in the court's opinion (p. 246), the Government, during the course of the case, formally conceded that the decedent, since on a cash basis, did not realize any income on account of the item, but argued that it was income to the executor. The court held that on the Government's concession the income was not income in the prior-to-death return and that since the amount of the item had been included in the estate tax return and an estate tax paid thereon, it was not subject to income tax in the executor's post-death return.

This was the state of the law when the decedent herein died.

In the Revenue Act of 1934, a material change occurred. In Section 42 of that Act appeared a new provision reading:

> "In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period."

The respondent maintained below that this provision was merely a "clarification of existing law" and applicable in the instant case. This clearly is not the case. See *Nichols* v. *United States, supra.* Any doubt that the 1934 Revenue Act changed the law is definitely put at rest by the Senate and House Reports accompanying the 1934 Revenue Bill. See Report of Sub-Committee of the Ways & Means Committee of the House, Dec. 4, 1933, p. 15*; Report of the House Ways & Means Committee H. Rep. No. 704, 73d Congress, 2d Sess. p. 24.

On this aspect of the case, the Board in its decision herein stated (R. 46):

> "Respondent refers to section 42 of the Revenue Act of 1934 as a 'clarification of existing law.' We disagree with that construction. That provision, in our judgment changed the law. Nichols v. United States, 64 Ct. Cls. 241; Report of the Ways and Means Committee, p. 24, H. R. No. 704, 73d Cong., 2d sess."

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* The Report in part stated:

"Your subcommittee recommends adding to the first of these sections a provision requiring the income-tax return of a decedent to include amounts of income accrued up to the date of his death regardless of the fact that he may have kept his books on the cash basis. In the case of the second of these sections, a provision should be added allowing deductions to be likewise accrued.

"Since the courts have held that income accrued by a decedent prior to his death is not income to the estate, it follows that unless such income is taxable to the decedent it will escape income tax altogether. For the same reason, unless expenses which accrued prior to death are allowed to the decedent, they cannot be used. The recommendation made by the sub-committee *remedies* these defects."

The Circuit Court below did not refer to the Revenue Act of 1934, or place any reliance on Section 42 thereof.

It is significant that the Government, while asserting that Section 42 of the 1934 Act was a mere clarification of the law, itself has definitely repudiated any such position, for in its petition of review it expressly stated that it did not take exception to the Board's ruling excluding from income the decedent's distributive share of the so-called "open" commissions, or the interest on the decedent's firm capital or credit balance between July 31, 1933, and December 16, 1933 (R. 49), both of which items certainly are "accrued" items within the meaning of Section 42 of the 1934 Revenue Act.

POINT I.

The decision of the Court below violates the basic tenet of our income tax laws that income taxes are assessed upon the basis of a twelve-month period, never longer, although sometimes shorter.

From the enactment of our first revenue Act onward, our income tax laws have invariably provided for the assessment of income taxes on the basis of a twelve-month period, never longer. The Revenue Act of 1932 is illustrative of this and prior Acts. Section 41, entitled "General Rule", provides:

> "The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

Section 48, entitled "Definitions", provides:

> "(a) TAXABLE YEAR.—'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932.
>
> (b) FISCAL YEAR.—'Fiscal year' means an accounting period of twelve months ending on the last day of any month other than December.

And so also in many other sections covering the period of making returns, whether corporate or individual, estate or partnership.

This Court time and again has recognized this rule as one of the basic principles of our tax laws. *Helvering* v. *Morgan's Inc.*, 293 U. S. 121 (1934); *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359 (1931). In the *Morgan's Inc.* case this Court said that all of our Revenue Acts since 1917—

> "have uniformly required the taxpayer's returns to be made on the basis of the twelve months' accounting period shown by the taxpayer's books, whether it be the calendar year or a different fiscal year."

Under certain circumstances, provision is made for making returns for *less* than a twelve-month period, but so inherent in the law is the principle of a twelve-month period that the statute and the Commissioner's Regulations expressly require the Commissioner's approval before authorizing a return for less than twelve months. See Section 47 of the 1932 Revenue Act and Regulations 77, Art. 371, issued thereunder.

So far as we are aware, the statute and the Regulations contain not a word indicating, directly or indirectly, that

returns under any circumstances shall include more than a twelve-month period.

The Board of Tax Appeals in its decision below fully recognized these considerations. It said in part (R. 43):

> "To sustain respondent and include in decedent's taxable income, for the period prior to his death, the partnership income earned between July 31, 1933, the end of the partnership's fiscal year, and December 16, 1933, the date of decedent's death, would require our violation of the basic tenet of income tax law that such tax is assessed on the basis of a period of 12 months. See Helvering v. Morgan's, Inc., 293 U. S. 121; General Machinery Corporation, 33 B. T. A. 1215. The Revenue Act of 1932, section 47, specifically provides for 'Returns for a period of less than twelve months'. See also section 48(a) supra. The statute does not include a provision permitting returns for a period of more than twelve months."

The Circuit Court below went directly counter to this. The clear effect of its decision is to require the inclusion in one return of income over a period of 16½ months, in respect not alone of the decedent but of the surviving partners as well. If the partnership had been on a fiscal year basis ending January 31, 1933, the effect of the decision would have been to include in one return income received over a period of almost 23 months—well nigh two years. For a partnership is not taxed as a separate taxable entity; the income of the partnership is the income of the partners. See Section 181 *et seq.* of the Revenue Act of 1932 and Regulations 77, Articles 901 *et seq.* issued thereunder.

Perhaps the greatest vice of such a position as that for which the respondent contends is its effect on the rate of surtax. For example, by including the decedent's share of the partnership profits for 16½ months, the decedent's surtax rate is raised from 29% (applicable as the return was filed) to 50% under the Commissioner's determination. Surely Congress should not be taken to have intended any such incon-

gruous and discriminatory result, without clear and convincing language so indicating.

The Circuit Court below seems to have realized the weight of the argument and endeavored to counter by asserting that income for only a twelve-month period would be included in the prior-to-death return. But its reasoning is specious. After expressly saying that "a partnership is not a taxpayer" and adding that the death of the decedent terminated a second taxable year within 1933, the Court continued (R. 59):

> "Of course this made two 'partnership taxable years' end in one taxable year of the decedent. Yet that did not make his taxable year include his income for more than twelve months. It did, indeed, include his share of partnership income for more than a twelve-month period, but that is immaterial since the partnership is not the taxpayer."

If the decedent, as a partner, was nevertheless the taxpayer, i.e. the individual who in his individual capacity earned his share of the firm income, then the firm income is his income, and the inclusion in the decedent's prior-to-death return of his share of the firm income for the full year ended July 31, 1933, and for the period August 1, 1933, to December 16, 1933, definitely throws into one return income attributable to the decedent for a full 16½ months' period. There is no escape from this conclusion.

The case of *Bull* v. *United States,* 295 U. S. 247 (1934), cited by the Court below, is not in point, for there the partnership and the partner were both on the calendar year basis, so that there was no question of including in the final return income for more than a twelve-month period.

POINT II.

Section 182(a) of the 1932 Revenue Act definitely negatives the rule prescribed by the Court below, for the section contemplates the inclusion in the prior-to-death return of partnership income for not more than one partnership period.

Section 181 imposes the tax in respect of partnership income squarely upon the partner and in his individual capacity for it provides:

> "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

Section 182(a) prescribes *in what period* the partnership income shall be taxed to the individual partner. The section provides:

> "(a) General Rule. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for *any* taxable year of the partnership ending within his taxable year."

Thus the general rule is that the partner shall include as his income his share of the "net income" of the partnership "for the taxable year" of the partnership. Now it is essential to fix the period which constitutes the taxable year for, while the net income is the income of and taxable to the partners, it can be computed only on the basis of the gross income and the allowable deductions of the partnership.

Partnerships are often on a fiscal as distinguished from a calendar year, and may keep their books either on a cash

or on an accrual basis, while individuals are usually on a calendar year and a cash basis. So it is necessary to make provision for the case where the partnership "net income" is computed on one basis, while the partner is on another basis. Bearing in mind the cardinal principle of our income tax laws that an individual should not be taxed on income over more than a twelve-month period, and the grave discrimination which would arise under the graduated surtax rates if such were done in the case of partnerships and only in the case of a partnership, Congress very carefully avoided any such result by adding the second sentence when formulating Section 182(a). If, said Congress, the taxable year of the partnership and the partner differ, then the partnership income taxable to the partner shall be the income of the partnership "for *any* taxable year of the partnership ending within" the partner's taxable year.

The word "any" usually connotes the singular, although where the context requires it, it may include the plural. But as used in the second sentence of Section 182(a), certainly the context does not require a plural meaning. If Congress had so intended it, it would have been quite simple to use the phrase "for any taxable year *or years*". When we consider the scrupulous care of the law to impose taxes on periods never in excess of twelve months, it seems clear that Congress definitely used the word "any" in its singular sense, and intended that the net income of the partnership for only *one* taxable year of the partnership ending within the partner's taxable year should be included in the return of the partner.

This in fact is the interpretation which the Commissioner has put upon the second sentence of Section 182(a) in the Regulations issued under such section. Article 902 of Regulations 77 provides:

> "*Distributive shares of partners.*—The distributive share of the net income of the partnership which a partner is required to include in his return is his proportionate share of the net income of the partnership, either—

(a) For the taxable year upon the basis of which the partner's net income is computed,

or

(b) If the partner's net income is computed upon the basis of a taxable year different from that upon the basis of which the net income of the partnership is computed, for *the* taxable year of the partnership ending within the taxable year upon the basis of which the partner's net income is computed.

Amounts earned and distributed to a partner by a partnership after the end of its taxable year and before the end of his corresponding taxable year should be accounted for both by the partnership and by the partner in their returns for their next succeeding taxable years. * * *"

Now the word "the" very obviously is the singular. The Regulations thus clearly contemplate the inclusion in the partner's income of *only one* partnership period income. If there be any doubt concerning the intent of Section 182(a), which we submit there cannot be for the language is simple and succinct, certainly this administrative interpretation of the section in Article 902 of the Commission's Regulations must dispel the doubt.

POINT III.

The death of the decedent did not terminate the partnership's "taxable year" and so create a "second" partnership taxable year ending within the decedent's calendar year, as the Court below held.

In view of the explicit language of Section 182(a), the respondent is forced to maintain that the death of the decedent on December 16, 1933, terminated a second taxable year of the partnership within the period of the decedent's prior-to-death return. If this did not occur, the respondent's case

must inevitably fall. The Board, following a long line of earlier decisions, held that the death of the decedent did not so terminate a second taxable year. The Court below held that it did.

The argument is a curious one. The firm of Anderson, Clayton & Fleming is a New York partnership and so subject to the provisions of the New York Partnership Law, which follows substantially the Uniform Partnership Act. Under Section 62 of the New York Act, the death of a partner causes "the dissolution" of the partnership. But "dissolution" is not "termination". Thus Sections 60 and 61 provide:

> "Sec. 60. *Dissolution defined.*—The dissolution of a partnerhip is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.
>
> "Sec. 61. *Partnership not terminated by dissolution.* —On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

Nevertheless, said the Court below, although the partnership was not terminated on the decedent's death—"As a continuing source of income to the decedent, it ceased to exist when he died."

This is a rather metaphysical distinction. Certainly under the New York Partnership Act, the firm did not cease to exist; it definitely continued in existence "until the winding up of the partnership affairs is completed". This, according to the stipulation of facts and the findings of the Board, did not occur until some time in February, 1934 when the final distribution was made (R. 14, 39). In point of fact, the firm continued to operate and carry on business as before well into 1934, for it is stipulated and found by the Board as a fact that—"Following the decedent's death on December 16, 1933, the business of the partnership was con-

tinued under the same name by the surviving partners" (R. 12, 39), and the "Liquidation of the partnership was commenced early in 1934". These considerations definitely negative the termination or end of the partnership when the decedent died. The only reason that the death terminated the continuance of the decedent's income from the firm was that he was on the cash basis and death prevented any further "receipts" by the decedent. But this did not affect the continuance of the activities of the *partnership* as such.

It is true that following the death an audit of the partnership accounts was made from the end of the last fiscal year until the date of death. But this accounting was not the annual accounting required by the firm articles on July 31 of each year. It was an accounting simply for the purpose of determining the rights of the estate and necessary in order to pay off the estate and permit the estate to make the necessary estate tax return. In respect of the surviving partners, the partnership continued. Certainly as to such partners, the partnership taxable year remained the same after as before the death of the decedent. The death was purely adventitious, so far as they were concerned. But if the partnership taxable year continued as to the surviving partners, it could not have terminated in respect of the decedent. Where the partnership agreement fixes the partnership taxable year as the fiscal year ending July 31, 1933, the partnership taxable year continues, we submit, regardless of the intervening death of a partner, until the end of the current fiscal year, or, where liquidation is completed prior to the end of the fiscal year, certainly until liquidation is completed. This did not occur here until February 1934 (R. 14, 39).

In the case of a corporation, the act of dissolution (as distinguished from final liquidation) has never been held to terminate or shorten the corporation's taxable year, whether the corporation is on the cash or the accrual basis, or whether on the calendar year or fiscal year basis. One return

and only one return is required for the full year, and if the act of dissolution occurs prior to the end of the accounting period, the trustees in dissolution must prepare and execute the return, and must include all items of gross income and deductions arising in the full year's period. *Mrs. Grant Smith* v. *Commissioner*, 26 B. T. A. 1178 (1932); *Elgin Compress Co.* v. *Commissioner*, 31 B. T. A. 272 (1934); *Pittsburgh & West Va. Ry. Co.* v. *Commissioner*, 32 B. T. A. 66; *Forest Glen Creamery Co.* v. *Commissioner*, 33 B. T. A. 564 (1935); *Palomas Land & Cattle Co.* v. *Commissioner*, 33 B. T. A. 999 (1935); G. C. M. 2080, C. B. VI-2, p. 288. Thus in the *Smith* case the Board said:

> "* * * But, where a corporation is dissolved during a particular calendar year and its affairs remain in the hands of liquidating trustees for the remainder of the year, we know of nothing in the applicable revenue act and the Commissioner's regulations thereunder which warrants dividing up the calendar year into two taxable periods, viz., the first period covering the time prior to the date of dissolution of the corporation and the second period covering from the time when trustees in liquidation took charge to the end of the calendar year."

This Court in *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, has held that even though within the year the taxpayer corporation became affiliated with another corporation and even though two returns were filed for the full year period, nevertheless the taxable year of the taxpayer corporation was not terminated for income tax purposes.

Similarly, in the case of an individual, his death within the twelve-month period does not terminate the taxable year. *Bankers Trust Co.* v. *Bowers*, 295 F. 89. There the Circuit Court for the Second Circuit said (p. 92):

> "* * * The fundamental scheme of title 2 of the Revenue Act is for a tax upon the net income of the taxpayer during an accounting period of 12 successive months. This general accounting period seems to be a predeter-

> mined measure to be applied to a taxpayer as income, and is not affected by his death or change of status within the period. The tax is imposed upon the entire net income for such period, and the return of such income constitutes his return for the period of 12 full months, even though he may have lived only a portion thereof."

Whether it be a corporation, an individual or a partnership, the reason for the rule is quite apparent. In Section 48 (see Appendix), the statute contains a general definition of the "taxable year". This definition is applicable among all classes of taxpayers, corporate, individual, partnership or estate. It provides that the "taxable year" *means* (not includes) the calendar year, or the fiscal year ending during such calendar year *upon the basis of which the net income is computed under this Part*" (Italics ours). The section contemplates returns for a fractional part of a year, but only where the law or the Regulations provide for such returns. This provision of the statute covers cases where there is a change from a calendar year to a fiscal year or from one fiscal year to another, and such a change is made conditional on the Commissioner's approval. See Sections 46 and 47. In the circumstances here presented, neither the law nor the Regulations provide for a partnership return for a fractional part of a year. There is nothing here which justifies the contention that the death of a partner terminates the taxable year of the partnership.

Indeed, in the entire gamut of the Income Tax Acts, there is only one instance where the taxable year may be shortened by termination. This is where the Commissioner finds that the taxpayer is about to depart from the United States, and the collection of the tax is endangered. See Section 146.

In view of the universal use of a full twelve-month period as the basis for reporting income, surely somewhere in the Act Congress would have provided in clear terms for the termination of the partnership year on the death of a partner if it had so intended.

The Board below, quoting from an earlier decision where the facts were identical (except for the fiscal year date), said (R. 43):

> "It seems clear to us that the death of a partner does not shorten the partnership's fiscal or calendar year to an accounting period terminating at the death of the partner and that only a complete liquidation during the calendar or fiscal year terminates the accounting period. This partnership has but one accounting period ending in 1920. The statutory net income of the partnership could not in this instance be computed before the close of its fiscal year. This being our view, we must hold that there should be included in the deceased's return of income for 1920 only his distributive share of the partnership net income for its fiscal year ending January 31, 1920."

All the decided cases support the conclusion of the Board in the instant case; none support the decision of the Court below. There are two earlier Board decisions which are squarely in point. *Archbald* v. *Com'r.*, 4 B. T. A. 483 (1926); *DeRoy* v. *Com'r.*, 19 B. T. A. 452 (1930), in both of which the Commissioner has formally acquiesced.* The General Counsel of the Commissioner himself so ruled. G. C. M. 2308, VI-2 Cum. Bul. 229 (1927). In two other cases, the Board has held that the dissolution of a partnership does not terminate the accounting period. *Tooke* v. *Com'r.*, 17 B. T. A. 690 (1929); *Reynolds* v. *Com'r.*, 17 B. T. A. 693 (1929). In both of these cases the Commissioner has formally acquiesced.†

Perhaps the most succinct statement of the reason for the rule is found in the Board's early decision in the *Archbald* case. After saying that the twelve months' accounting period is "one of the cornerstones of our tax structure", the Board said (p. 485):

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* VI-1 Cum. Bul. page 1; IX-2 Cum. Bul. page 16.

† IX-1 Cum. Bul. page 51; IX-1 Cum. Bul. page 46.

> "It is true, of course, that earnings of a partnership are the property of the individual partners as soon as earned. This legal theory has not, however, been applied in the computation of net income for the purpose of taxation. The statute expressly recognizes definite accounting periods for the partnership, for the partner, or for both, and has used the calendar or fiscal year as the measure. Calendar and fiscal years are but twelve-month accounting periods. During the existence of the partnership a partner's taxable income therefrom is not measured by his share of the partnership earnings as they are earned, but, on the contrary, the statute requires that it be measured by his share of its *net income* during its accounting period, *computed at the close of such period,* and this entirely without regard to distribution or ownership. The principle of requiring and permitting the computation of income on the basis of a twelve-month accounting period was strictly adhered to."

The instant case must be distinguished from two lines of cases. In *Bull* v. *United States,* 295 U. S. 247, the partner died within the calendar year. This Court held that the prior-to-death return must include the firm income up to the day of the decedent's death. But the firm and the deceased partner were both on the calendar year basis. The case came squarely under the first sentence of Section 182(a) and involved the inclusion of income for *less*—not more—than a twelve-month period. The case is clearly distinguishable, for wholly different considerations came into play.

Similarly, the Board reached the same result in *Goldman et al.* v. *Com'r.,* 15 B. T. A. 1341. In the *Goldman* case, the Board said (p. 1345):

> "Recognizing the fact that the taxable year of the partnership might be a different year from that of a partner, provision is made to cover such a state of case. In this proceeding, we are not concerned with this question, since the taxable year of the decedent coincides with the taxable year of the partnership."

It is significant that the *Goldman* case was decided after the *Archbald* case and before the *DeRoy* case, and in the instant case the Board cited and followed the *Archbald* and *DeRoy* cases. Clearly the Board felt and feels that the *Goldman* case and cases of that character present a wholly different situation.

Then there are those cases where the partner was on a calendar year basis and the firm was on a fiscal year basis but the partner died *before* and not *after* the end of the partnership fiscal years. There the deceased partner was required to include in the prior-to-death return his share of the income from the partnership up to his death. *Darcy* v. *Com'r.*, 66 F. (2d) 581 (C. C. A. 2d, 1933). But in these cases again there was no question of taxing income over more than a twelve-month period.

The two subsequent returns filed on behalf of the surviving partners, one captioned "Fiscal year beginning August 1, 1933, and ended December 16, 1933," and the other captioned "Fiscal year December 17, 1933 to July 31, 1934" are without significance.

In the first place, as the Board below said (R. 44), under the law a taxpayer cannot file returns for less than a full twelve-month period without the Commissioner's approval and the Commissioner did not approve. Certainly the surviving partners could not alter these requirements, and so the returns were neither authorized nor required. See Section 189 and Article 941 of Regulations 77. Secondly, the interests of a deceased partner cannot be prejudiced by the act of the surviving partners; nor can the act of surviving partners constitute any ground for an estoppel in the case of the deceased partner. Finally, as the Board pointed out (R. 45) any argument based on estoppel must fail since it is not shown that the respondent relied upon any act of the decedent or his surviving partners or his executor, causing detriment to the respondent.

POINT IV.

The judicial and administrative construction of Section 182(a) for which we contend has received the implied approval of Congress.

The *Archbald* case, *supra,* which the Board followed in the instant case, was decided in 1926. As already pointed out, the Commissioner acquiesced in the decision in 1927 and it was followed by his General Counsel in the same year. G. C. M. 2308, *supra.* The *DeRoy* case, *supra,* was decided by the Board in 1930 and acquiesced in by the Commissioner in that year. The cases of *Tooke* v. *Commissioner, supra,* and *Reynolds* v. *Commissioner, supra,* decided in 1929, held squarely that the dissolution of a partnership does not terminate its accounting period, and the Commissioner acquiesced in these decisions. After Section 182(a) had been thus construed by the Board in the *Archbald* case and the later Board cases, and in G. C. M. 2308, Congress re-enacted the section without amendment in the subsequent Revenue Acts. Such re-enactment of the statute constitutes implied legislative approval of the administrative and judicial construction. *Heald* v. *District of Columbia,* 254 U. S. 20 (1920); *Helvering* v. *Bliss,* 293 U. S. 144, 151 (1934); *Old Mission Portland Cement Co.* v. *Helvering,* 293 U. S. 289 (1934).

CONCLUSION.

The decision of the Board below is in accord with the fundamental structure of our income tax statutes; it is in accord with the express requirements of the statute and the Commissioner's Regulations; it avoids the incongruity and unfairness of taxing in one return income realized over as much as 23½ months, with the attendant burden of sub-

jecting such income to surtax rates far in excess of any rate applicable to one year's income; and finally it has the virtue of upholding a rule which has been in effect for upwards of fifteen years, thus insuring uniformity among taxpayers similarly situated.

It is respectfully submitted that the decision of the Circuit Court should be reversed and the order of the Board approved.

Respectfully Submitted,

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APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169, 185, 186, 187, 217, 222:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

SEC. 48. DEFINITIONS.

When used in this title—

(a) TAXABLE YEAR.—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932.

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

SEC. 182. TAX OF PARTNERS.

(a) General rule. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year.

New York Partnership Act, Laws of 1919, c. 408:

SEC. 60. Dissolution defined.— The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

SEC. 61. Partnership not terminated by dissolution.— On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

SEC. 62. Causes of dissolution.— Dissolution is caused:

* * * * * * *

4. By the death of any partner;

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Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 371. Returns for periods of less than 12 months.— No return can be made for a period of more than 12 months.

* * * * * * *

The return of a decedent or of his estate for the year in which he died is a return for 12 months and not for a fractional part of a year.

ART. 901. Partnerships.— Partnerships as such are not subject to taxation under the Act, but are required to make returns of income. (See section 189 and articles 941 and 942.) Individuals carrying on business in partnership are, however, taxable upon their distributive shares of the net income of such partnership, whether distributed or not, and are required to include such distributive shares in their returns. The net income of the partnership shall be computed in the same manner and on the same basis as the net income of an individual, except that the deduction of contributions or gifts is not permitted, * * *.

ART. 902. Distributive Shares of Partners.— The distributive share of the net income of the partnership which a partner is required to include in his return is his proportionate share of the net income of the partnership, either—

(a) For the taxable year upon the basis of which the partner's net income is computed, or

(b) If the partner's net income is computed upon the basis of a taxable year different from that upon the basis of which the net income of the partnership is computed, for the taxable year of the partnership ending within the taxable year upon the basis of which the partner's net income is computed.

Amounts earned and distributed to a partner by a partnership after the end of its taxable year and before the end of his corresponding taxable year should be accounted for both by the partnership and by the partner in their returns for their next succeeding taxable years.